Plaza Rakyat Sdn Bhd v Datuk Bandar Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — SUIT NO D-24NCC-128 OF 2010
MAH WENG KWAI JC
9 MAY 2011

Civil Procedure — Injunction — Interim injunction — Arbitration agreement — Application for interim injunction pending arbitration to prevent repossession of lands and cancellation of leases — Principles applicable — Whether bona fide serious issue to be tried shown — Whether balance of convenience favoured granting of injunction — Whether damages sufficient remedy — Injunction needed to prevent decision of arbitrator from being rendered academic or nugatory — Arbitration Act 2005 s 11

Dewan Bandaraya Kuala Lumpur ('DBKL'), the defendant, is the holder of a 99 year lease of land along Jalan Pudu, Kuala Lumpur, where the Pudu Raya bus station is located and its surrounding areas. The land is held under five titles. The plaintiff was to embark on an urban renewal project to transform the area into a transportation hub which would include, inter alia, an integrated terminal for bus, taxi and light rail together with hotels, office and business premises ('the project'). The plaintiff and defendant entered into a joint venture agreement ('JVA') on 16 December 1992. The defendant granted to the plaintiff five registered leases of 88 years over the project land. The plaintiff undertook to construct at its own costs certain agreed structures and to hand them to the defendant. The project was scheduled to be completed in 72 months with construction work commencing in early 1994. Due to soft and unstable soil conditions and shortage of cement nationwide, construction work was affected resulting in the plaintiff requesting for extensions of time for completion. One of the main complaints by the plaintiff during the performance of the contract was the delay occasioned by the defendant in response to the plaintiff's applications. During the period from 1998 till late 2009, for a variety of reasons the plaintiff was unable to proceed with further construction of the project. Construction works slowed down and came to an almost standstill. Numerous meetings and discussions were held between the plaintiff and defendant to restart the project. Attempts made to enter into various agreements granting an extension of time to the plaintiff to complete the project did not materialise. On 21 April 2010, the defendant issued letters to the plaintiff purporting to terminate the JVA and the lease agreements. The defendant gave notice to take possession of the project land and to cancel the plaintiff's five registered leases. The defendant agreed with the plaintiff to refer all issues arising from the JVA and the lease agreements to arbitration. On 26 April 2010 the plaintiff filed an originating summons (encl 1) to obtain an

interim injunction pending the final disposal of the dispute between the plaintiff and defendant through the arbitration process. The plaintiff also sought to restrain the defendant from repossessing the project land and from cancelling the five leases. On 14 May 2010 the defendant filed a summons in chambers (encl 10) seeking to set aside the ex parte order of interim injunction, granted by the court on 27 April 10; a declaration that the defendant was entitled to vacant possession of the project land; an order that the plaintiff deliver vacant possession of the project land to the defendant; and for the removal of the five registered leases. The issues arising for determination were: (i) whether the disputes between the plaintiff and defendant formed serious questions to be tried in the arbitration proceedings; and (ii) whether the status quo of the project and the project land should be maintained pending the arbitration proceedings.

Held, allowing encl 1 and dismissing encl 10 with costs:

(1) The plaintiff's application for an injunction was made pursuant to s 11 of the Arbitration Act 2005. There was a threat by the defendant to forcibly take possession of the project land by its letter dated 21 April 2010 and to cancel the plaintiff's five leases pursuant to s 240 of the National Land Code. The plaintiff perceived the threat to be real. For the defendant to threaten to retake possession of the project land without any court order would be tantamount to resorting to self help by a public authority. The plaintiff was thus quite clearly justified in making the application for an injunction to preserve the very status of the intended arbitration proceedings by the parties so that the decision of the arbitrator would not be rendered academic and/or nugatory (see para 45).

(2) In considering the application for an interlocutory injunction the court must consider the following elements: (i) whether there is a bona fide serious issue to be tried in the arbitration proceedings on the facts presented by the parties; (ii) where the justice of the case lies; and (iii) whether the status quo of the case before the defendant's threat to repossess the project land and to cancel the five leases ought to be maintained (see paras 46–47); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 referred, *Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd* [2005] 1 MLJ 293 referred.

(3) There were bona fide serious issue to be tried as follows: (i) whether time had in fact and in law been set at large and was no longer the essence of the contract; (ii) whether the defendant could repossess the project land by merely issuing the notices to do so without first arming itself with a court order directed to the plaintiff to deliver vacant possession; (iii) whether there was lack of good faith and breach of fiduciary duties on the part of the defendant; and (iv) whether the plaintiff was a mere contractor or a developer (see paras 48–50 & 54).

(4) As for the balance of convenience, it was not that the plaintiff wanted to remain on the project land and do nothing as it had every intention to proceed with the resolution of the disputes through arbitration. The scales of justice would be balanced with the defendant made to wait a little longer pending the resolution of all disputes by the arbitrator. The justice of the case lay in favour of the plaintiff to let the status quo remain until the arbitrator had the chance to arbitrate on the disputes (see para 57).

(5) The plaintiff had spent tens of millions of ringgit in the construction of the project. Apart from the monetary loss, its reputation has been affected in not being able to complete the project. The plaintiff was more interested in salvaging and/or maintaining its reputation by completing the project rather than in monetary compensation. In any event no offer of monetary compensation was made by the defendant and besides it would be difficult to quantify the damages given that the delay has been for more than 13 years. Further, after the launch of the project, 211 purchasers had purchased business premises from the plaintiff. The plaintiff should not be placed in a position where its contractual obligations to these purchasers will be affected but instead the plaintiff should be encouraged to fulfill them. If the non-completion of the project was due to the breaches by the plaintiff, the defendant ought to have taken action against them way back in 1998 after the expiry of the 72 months contractual period. Why the defendant did not do so was not explained and after a slumber of 13 years the defendant suddenly awakened and was in a hurry to complete the project in the 'public interest'. Further, if the defendant proceeded to secure a third party to complete the project and in the event it was subsequently decided by the arbitrator that the termination of the JVA and the leases was wrong, the quantum of damages to be paid by the defendant would have been enormous and quite frightening. The balance of convenience clearly lay in favour of the plaintiff (see paras 62–63).

[Bahasa Malaysia summary

Dewan Bandaraya Kuala Lumpur ('DBKL'), defendan, merupakan pemegang 99 tahun pajakan hartanah sepanjang Jalan Pudu, Kuala Lumpur, di mana letaknya stesen bas Pudu Raya dan kawasan sekelilingnya. Hartanah tersebut dipegang di bawah lima hakmilik. Plaintif akan membangunkan sebuah projek pembaharuan bandar untuk mengubah kawasan tersebut kepada sebuah pusat kegiatan pengangkutan di mana termasuk, antara lainnya, sebuah terminal bersepadu untuk bas, teksi dan landasan kereta api aliran ringan bersama dengan hotel-hotel, pejabat dan premis-premis perniagaan ('projek'). Plaintif dan defendan memeterai sebuah perjanjian usahasama ('JVA') pada 16 Disember 1992. Defendan memberikan lima pajakan berdaftar 88 tahun terhadap hartanah projek tersebut kepada plaintif. Plaintif berjanji untuk

membangunkan pada kos sendiri beberapa struktur-struktur yang dipersetujui dan menyerahkannya kepada defendan. Projek tersebut dijadualkan akan selesai dalam 72 bulan dengan kerja-kerja pembinaan bermula pada awal 1994. Disebabkan keadaan tanah yang lembut dan tidak stabil dan kekurangan simen di seluruh negara, kerja pembinaan terjejas dan menyebabkan plaintif memohon untuk lanjutan masa untuk menyiapkannya. Salah satu daripada aduan utama plaintif semasa perlaksanaan kontrak ialah kelewatan yang dilakukan oleh defendan begi membalas permohonan plaintif. Sepanjang tempoh daripada 1998 hingga penghujung 2009, plaintif gagal untuk meneruskan pembinaan projek tersebut di atas pelbagai sebab. Kerja-kerja pembinaan berjalan lambat dan hampir tidak berjalan. Beberapa mesyuarat dan perbincangan diadakan di antara plaintif dan defendan untuk memulakan semula projek tersebut. Percubaan-percubaan dibuat untuk memeterai pelbagai perjanjian membenarkan lanjutan masa kepada plaintif untuk menyiapkan projek tersebut telah gagal. Pada 21 April 2010, defendan mengeluarkan surat-surat kepada plaintif bertujuan untuk membatalkan JVA dan perjanjian-perjanjian pajakan. Defendan memberi notis untuk mengambil milikan hartanah projek dan membatalkan kelima-lima pajakan berdaftar plaintif. Defendan bersetuju dengan plaintif untuk merujuk kesemua isu yang timbul daripada JVA dan perjanjian-perjanjian pajakan kepada timbang tara. Pada 26 April 2010, plaintif memfailkan saman permula (lampiran 1) untuk mendapatkan injunksi interim sementara menunggu keputusan muktamad berkenaan pertikaian di antara plaintif dan defendan melalui proses timbang tara. Plaintif juga menuntut untuk menahan defendan daripada mendapatkan milikan semula hartanah projek tersebut dan membatalkan kelima-lima pajakan. Pada 14 Mei 2010, defendan memfailkan saman dalam kamar (lampiran 10) menuntut untuk mengetepikan perintah ex parte injunksi interim, dibenarkan oleh mahkamah pada 27 April 2010; satu pengisytiharan bahawa defendan berhak kepada milikan kosong hartanah projek tersebut; satu perintah bahawa plaintif menyerahkan milikan kosong hartanah projek tersebut kepada defendan; dan untuk membatalkan kelima-lima pajakan berdaftar tersebut. Isu-isu yang timbul untuk ditentukan ialah: (i) sama ada pertikaian-pertikaian di antara plaintif dan defendan membentuk persoalan serius untuk dibicarakan di prosiding-prosiding timbang tara; dan (ii) sama ada status quo projek dan projek hartanah perlu dikekalkan sementara menunggu prosiding-prosiding timbang tara.

Diputuskan, membenarkan lampiran 1 dan menolak lampiran 10 dengan kos:

(1) Permohonan plaintif untuk injunksi dibuat menurut s 11 Akta Timbang Tara 2005. Terdapat ugutan oleh defendan untuk mengambil milikan hartanah projek secara paksa melalui surat bertarikh 21 April 2010 dan untuk membatalkan kelima-lima pajakan plaintif menurut s 240 Kanun Tanah Negara. Plaintif menganggap ugutan tersebut adalah benar. Ugutan defendan untuk mengambil semula milikan hartanah projek

tanpa sebarang perintah mahkamah sama seperti pihak berkuasa menggunakan bantuan sendiri. Oleh itu adalah wajar bagi plaintif dalam membuat permohonan untuk satu injunksi bagi mengekalkan status tujuan prosiding-prosiding timbang tara oleh pihak-pihak agar keputusan penimbang tara tidak dianggap akademik dan/atau sia-sia (lihat perenggan 45).

(2) Dalam mempertimbangkan permohonan untuk injunksi interlokutori, mahkamah harus mengambilkira elemen-elemen berikut: (i) sama ada terdapat isu serius untuk dibicarakan dalam prosiding-prosiding timbang tara berdasarkan fakta-fakta yang dikemukakan oleh pihak-pihak; (ii) di mana letaknya keadilan kes ini; dan (iii) sama ada *status quo* kes sebelum tuntutan defendan untuk mendapatkan milikan semula hartanah projek dan untuk membatalkan kelima-lima pajakan harus dikekalkan (lihat perenggan 46–47); *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 dirujuk, *Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd* [2005] 1 MLJ 293 dirujuk.

(3) Terdapat isu bona fide yang serius untuk dibicarakan seperti berikut: (i) sama ada masa dari segi fakta dan undang-undang telah ditetapkan secara meluas dan bukan lagi merupakan intipati kontrak; (ii) sama ada defendan akan mengambil milikan semula hartanah projek tersebut dengan hanya mengeluarkan notis berbuat demikian tanpa bersedia dengan perintah mahkamah terlebih dahulu yang mengarahkan plaintif untuk menyerahkan milikan kosong; (iii) sama ada terdapat terdapat niat keji dan pelanggaran tugas-tugas fidusiari bagi pihak defendan; dan (iv) sama ada plaintif hanya merupakan kontraktor atau pemaju (lihat perenggan 48–50 & 54).

(4) Bagi imbangan kemudahan, plaintif bukanlah mahu kekal berada di hartanah projek dan tidak berbuat apa-apa memandangkan plaintif berniat untuk meneruskan dengan keputusan pertikaian-pertikaian melalui timbang tara. Skala keadilan boleh diimbangi sekiranya defendan menunggu lebih lama sementara menunggu keputusan kepada kesemua pertikaian oleh penimbang tara. Keadilan kes ini terletak kepada plaintif untuk membenarkan *status quo* dikekalkan sehingga penimbang tara berpeluang menimbang tara pertikaian-pertikaian tersebut (lihat perenggan 57).

(5) Plaintif telah membelanjakan puluhan juta ringgit bagi pembinaan projek tersebut. Selain daripada kerugian wang, reputasi plaintif juga terjejas akibat tidak dapat menyiapkan projek tersebut. Plaintif lebih berminat dalam menyelamatkan dan/atau mengekalkan reputasinya dengan menyiapkan projek daripada ganti rugi kewangan. Dalam mana-mana keadaan, tiada tawaran ganti rugi kewangan dibuat oleh defendan dan malahan, adalah sukar untuk menentukan kerugian memandangkan kelewatan tersebut adalah melebihi 13 tahun.

Seterusnya, selepas perasmian projek tersebut, 211 pembeli-pembeli telah membeli premis-premis perniagaan daripada plaintif. Plaintif tidak seharusnya diletakkan di dalam keadaan di mana kewajipan-kewajipan kontraktual terhadap pembeli-pembeli ini terjejas tetapi plaintif sepatutnya digalakkan untuk memenuhinya. Sekiranya ketidaksiapan projek tersebut disebabkan oleh pelanggaran oleh plaintif, defendan sepatutnya mengambil tindakan terhadap mereka pada 1998 selepas tamat 72 bulan tempoh kontrak. Mengapa defendan tidak berbuat demikian tidak dijelaskan dan selepas lewat selama 13 tahun, defendan tiba-tiba terbangun dan dalam keadaan tergesa-gesa mahu menyiapkan projek atas 'kepentingan awam'. Seterusnya, sekiranya defendan meneruskan untuk mendapatkan pihak ketiga untuk menyiapkan projek tersebut dan dalam keadaan tersebut diputuskan oleh penimbang tara bahawa pembatalan JVA dan pajakan-pajakan adalah bersalahan, quantum kerugian yang harus dibayar oleh defendan adalah amat besar dan menakutkan. Imbangan kemudahan secara jelas berpihak kepada plaintif (lihat perenggan 62–63).]

Notes

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3425–3508.

Cases referred to

American Cyanamid Co v Ethican Ltd [1975] AC 396, HL (refd)

Datuk Johari Abdul Ghani & Ors v QSR Brands Bhd & Ors [2007] 4 MLJ 19, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd [1991] 3 MLJ 269, HC (refd)

Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169, CA (refd)

Tenaga Nasional Berhad v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133 ; [2001] 1 CLJ 695, CA (refd)

Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd [2005] 1 MLJ 293, CA (refd)

Legislation referred to

Arbitration Act 2005 s 11

National Land Code ss 213, 223(2), 240

Specific Relief Act 1950 ss 7(2), 20(1)(b), 54(f)

S Siva (Lim Cheng Bock and Sharmini Ganesan with him) (Cheah, Teh & Su) for the plaintiff.

B Thangaraj (Siti Hanisah with him) (Thangaraj & Associates) for the defendant.

Mah Weng Kwai JC:

BACKGROUND FACTS

[1] Dewan Bandaraya Kuala Lumpur (DBKL), the defendant is the holder of a 99 year lease of land along Jalan Pudu, Kuala Lumpur, where the Pudu Raya bus station is located and its surrounding areas. The land is held under five titles.

[2] The plaintiff was to embark on an urban renewal project to transform the area into a transportation hub which would include, inter alia, an integrated terminal for bus, taxi and light rail together with hotels, office and business premises. The project is known as the Plaza Rakyat project ('the project').

[3] The plaintiff and defendant entered into a joint venture agreement ('JVA') on 16 December 1992.

[4] The defendant in turn granted to the plaintiff five registered leases of 88 years over the project land.

[5] The plaintiff paid the sum of RM58,603,750 as premium in respect of the project land on behalf of the defendant to the land authority. The plaintiff besides agreeing to pay all quit rents, rates and other outgoings agreed to pay to the defendant a ground rental of RM10,000 per month for the five leases of the project land. The plaintiff undertook to construct at its own costs certain agreed structures and to hand them to the defendant. Other structures consisting of hotels, service apartments etc would belong to the plaintiff during the 88 year lease period.

[6] The project was scheduled to be completed in 72 months with construction work commencing in early 1994. The concept of development under the JVA was known as 'BLT' meaning 'Build Lease and Transfer'. Purchasers of property from the plaintiff would be subject to the plaintiff's tenure of the 88 year lease period.

[7] Wembley Industries Holding Bhd ('Wembley'), is the parent company and sole shareholder of the plaintiff.

[8] Due to soft and unstable soil conditions and shortage of cement nationwide, construction work was affected resulting in the plaintiff requesting for extensions of time for completion. One of the main complaints by the

plaintiff during the performance of the contract was the delay occasioned by the defendant in response to the plaintiff's applications.

[9] The plaintiff obtained a financing facility of RM200m from RHB Bank Bhd and other institutions. But after a draw down of RM50m only, the facility was frozen.

[10] Before Wembley was put under receivership, it had expended more than RM300m on the project.

[11] During the period from 1998 till late 2009, for a variety of reasons the plaintiff was unable to proceed with further construction of the project. Construction works slowed down and for all intents and purposes came to an almost standstill. Numerous meetings and discussions were held between the plaintiff and defendant to restart the project. Attempts made to enter into a supplementary agreement granting an extension of time to the plaintiff to complete the project did not materialise.

[12] In December 2005, the parties agreed to enter into a fresh development agreement which would have changed the BLT concept to an outright sale concept by the plaintiff. However, as the plaintiff felt that the terms imposed by the defendant were too onerous, the development agreement was not executed.

[13] Upon the delisting of Wembley, the principal financier of the plaintiff, the plaintiff managed to secure a white knight known as Global Upline Sdn Bhd to participate in and complete the project. In mid 2007, the defendant proposed that a revised joint venture agreement be entered into but by early 2008, this proposal too was abandoned.

[14] In June 2008, the defendant having earlier proposed that parties work on a memorandum of understanding (MOU) decided to abandon the MOU after having agreed on all the terms of the MOU.

[15] On 4 September 2008, the plaintiff sent to the defendant a draft of the proposed novation agreement at the request of the defendant. After several meetings the defendant abandoned the novation agreement in December 2008.

[16] Again, at the request of the defendant, a privatisation agreement was proposed to replace the novation agreement. This too was abandoned in less than a month.

[17] At the request of the plaintiff and Global Upline Sdn Bhd in August

2009, the defendant resumed discussions with the plaintiff. The discussions included the economic planning unit (EPU) of the Prime Minister's Department. After several meetings the defendant as part of the terms for a new agreement, insisted that the plaintiff transfer the project lands to the defendant immediately. As the plaintiff could not agree to this term, a final meeting was held on 1 October 2009. The plaintiff waited for a response from the EPU but none was forthcoming.

[18] After a lapse of more than four months, the defendant issued the notice to remedy default under the JVA and the lease agreements to the plaintiff in February 2010.

[19] The plaintiff disputed the defendant's notice and invoked the arbitration clauses in the JVA and lease agreements to refer the dispute to arbitration.

[20] On 21 April 2010, the defendant issued letters to the plaintiff purporting to terminate the JVA and the lease agreements. The defendant gave notice to take possession of the project land and to cancel the plaintiff's five registered leases.

[21] The defendant agreed with the plaintiff to refer all issues arising from the JVA and the lease agreements to arbitration.

THE DEFENDANT'S CONTENTIONS

[22] The defendant's main contention for the termination of the JVA and lease agreements and for the repossession of the project land is that the plaintiff has failed to complete the construction and to deliver the project within the extended completion dates, the last of which was on 31 May 2007. The plaintiff has in fact abandoned the project as construction of the building works stopped in 1997.

[23] The only reason why the plaintiff has not been able to complete the project is that it has no funds to do so.

[24] The defendant also contended that as the plaintiff had failed to pay the quit rents and ground rental the defendant is entitled to cancel the plaintiff's leases of the project land.

[25] The defendant has terminated the JVA and taken steps to forfeit the five leases for breach of contract and equitable misconduct by the plaintiff.

[26] Pending arbitration, the defendant intends to recover possession of the project land and to secure a third party to complete the project.

[27] The order of an injunction in encl 2 would amount to final relief being granted at an interlocutory stage and that nothing is left to be heard in the originating summons. As such the plaintiff must not only show a serious question to be tried but must establish a strong prima facie case for an injunction (see *Datuk Johari Abdul Ghani & Ors v QSR Brands Bhd & Ors* [2007] 4 MLJ 19; *American Cyanamid Co v Ethican Ltd* [1975] AC 396).

THE PLAINTIFF'S CONTENTIONS

[28] The plaintiff contended that the time for the completion of the project has been set at large by the conduct of the defendant and/or by operation of law due to the long and protracted negotiations that took place between the plaintiff and defendant between 2005 and 2010.

[29] The plaintiff also contended that it was not obliged to pay the quit rents and ground rental as the defendant had obstructed the plaintiff in the construction and completion of the project.

[30] In any event, the plaintiff contended that the defendant is legally estopped from strictly enforcing the terms of the JVA and the lease agreements due to its own conduct, omissions and breaches of the JVA and the lease agreements.

[31] Further, the plaintiff contended that the defendant as a joint venture partner had breached its duty of good faith towards the plaintiff by constantly obstructing and delaying the plaintiff in the construction and completion of the project.

[32] The plaintiff's case is that the purported termination and forfeiture of the plaintiff's leases and the intended repossession of the project land are invalid and bad in law.

THE APPLICATIONS

[33] On 26 April 2010 the plaintiff filed an originating summons (encl 1) to obtain, inter alia, an interim injunction and/or preservation order pending the final disposal of the dispute between the plaintiff and defendant through the arbitration process. The plaintiff also sought to restrain the defendant from repossessing the project land and/or to forfeit and/or to cancel the five leases of the project land.

[34] On the same day, the plaintiff filed an ex parte summons in chambers (encl 2) seeking, inter alia, an interim injunction and/or preservation order pending the disposal of the originating summons.

[35] And on 14 May 2010 the defendant filed a summons in chambers (encl 10) seeking:

(a) to set aside the ex parte order of interim injunction, granted by the court on 27 April 2010;

(b) a declaration that the defendant is entitled to vacant possession of the project land;

(c) an order that the plaintiff delivers vacant possession of the project land to the defendant; and

(d) the removal of the five registered leases by the Pentadbir Tanah dan Galian, Wilayah Persektutuan.

[36] The parties agreed to proceed with the hearing of encl 1 followed by encl 10, if necessary. It was agreed that with the disposal of the originating summons (encl 1), the hearing of the summons in chambers (encl 2) would be rendered academic.

DECISION OF THE COURT

[37] Upon reading the cause papers and the written submissions and upon hearing counsel for the plaintiff and defendant, the court on 23 February 2011 made the following orders:

(a) Originating summons (encl 1).
An order in terms of prayers 1 (a) and (b) that is, an order of interim injunction pending the final disposal of the dispute between the plaintiff and defendant through arbitration that will restrain the defendant and/or its agents and/or its servants and/or its officers from (a) taking any steps and/or continue to take action to repossess the project land and (b) taking any steps to cancel and/or determine and/or forfeit the five leases of the project land and costs;

(b) summons in chambers (encl 2).
No order; and

(c) summons in chambers (encl 10).
Dismissed with costs.

[38] The defendant being dissatisfied with the decision allowing prayers 1 (a) and (b) of encl 1 with costs and the dismissal of encl 10 with costs now appeals against the said decision.

REASONS FOR THE DECISION

[39] At the outset, it is important to bear in mind that the court is not requested nor is required to determine any of the issues in dispute arising from the construction of the project between the plaintiff and defendant.

[40] The parties have expressly agreed to refer all disputes arising to arbitration for resolution. The proposal was made by the plaintiff in its letter dated 30 March 2010 and was accepted by the defendant by letter dated 21 April 2010.

[41] It is not in dispute that the JVA and the lease agreements provide for disputes between the parties to be resolved by way of arbitration.

[42] What the court is required to determine in the originating summons is whether the disputes between the plaintiff and defendant form serious questions to be tried in the arbitration proceedings.

[43] It is obvious from the factual matrix of the case, stretching from 1992, when the JVA was first entered, till its purported termination in 2010, over a period of 18 years, many disputes have arisen between the parties. Complaints, accusations, allegations and charges have been levelled by one party against the other and vice versa. The parties, despite numerous attempts over the years to restart the construction works, have failed to reach any agreement to move the matter forward. Further, even during the hearing of this originating summons, numerous requests were made by counsel for the plaintiff and defendant for postponements pending settlement but alas to no avail.

[44] It is therefore paramount and incumbent upon the court to determine whether the status quo of the project and the project land should be maintained pending the arbitration proceedings, during which the parties will have all the opportunities to ventilate their complaints and grouses.

[45] The plaintiff's application for an injunction is made pursuant to s 11 of the Arbitration Act 2005 (the Act). The Act permits an application being made to the court to seek an interim injunction either before or during arbitral proceedings, the main objective of which is to preserve the subject matter ie the project and project land which has been referred to arbitration. This is in view of the threat by the defendant to forcibly take possession of the project land by

its letter dated 21 April 2010 and to cancel the plaintiff's five leases pursuant to s 240 of the National Land Code. The plaintiff has perceived the threat to be real. And for the defendant to threaten to retake possession of the project land without any court order would be tantamount to resorting to self-help by a public authority. The plaintiff is thus quite clearly justified in making the application for an injunction to preserve the very status of the intended arbitration proceedings by the parties so that the decision of the arbitrator would not be rendered academic and/or nugatory.

[46] The general principles for the granting of an interim injunction have been clearly stated by Gopal Sri Ram JCA (as he then was) in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. These principles have been adopted in *Thye Hin Enterprises Sdn Bhd v Daimler Chrysler Malaysia Sdn Bhd* [2005] 1 MLJ 293 where an injunction was sought pending the resolution of the dispute between the parties in arbitration proceedings.

[47] In considering the application for an interlocutory injunction the court must consider the following elements:

(a) whether there is a bona fide serious issue to be tried in the arbitration proceedings on the facts presented by the parties;

(b) where the justice of the case lies; and

(c) whether the status quo of the case before the defendant's threat to repossess the project land and to cancel the five leases ought to be maintained.

SERIOUS ISSUES TO BE TRIED

[48] The central issue in this case is whether time has been set at large and is no longer of the essence resulting in the notices of default and/or termination of the JVA and the lease agreements by the defendant premature, invalid and bad in law.

It is common ground that initially the project was to be completed within 72 months (six years) from 16 December 1992, the date of the JVA, that is, by 1998. However, the plaintiff was not in a position to complete the project by 1998 due to a variety of reasons especially the Asian economic crisis that hit Malaysia in 1997. Many discussions were held between the plaintiff and defendant and several extensions of time were given to the plaintiff with the last extension of time being granted till 31 May 2007. Despite the many proposals made to, inter alia, change the concept of construction and sales and to enter into new agreements, the parties failed to reach any new consensus. Protracted negotiations were carried on from 2007 till late 2009 with no new deadline in

sight. It looked as though the defendant was quite happy to just carry on negotiations till the notice of default was issued in 2010. In the circumstances it may not be entirely wrong for the plaintiff to contend that time had been set at large.

In the case of *Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169 the Court of Appeal held that when time is of the essence of the contract and the party in the right allows the time for completion to pass and the parties go on negotiating, then time is no longer to be regarded as of the essence of the contract, that is, time has become at large.

However, time can be made of the essence again by the defendant giving reasonable notice to the plaintiff to complete the construction of the project. But the defendant did not do so before the notices of default and/or termination of the JVA and lease agreements were issued thus rendering the said notices invalid and bad in law.

Thus, whether time has in fact and in law been set at large and is no longer the essence of the contract in this case is a bona fide serious issue to be tried.

[49] The next serious issue to be determined at the arbitration is whether the defendant can repossess the project land by merely issuing the notices to do so without first arming itself with a court order directed to the plaintiff to deliver vacant possession. The court is of the view that the defendant cannot resort to the remedy of self help in Malaysia by virtue of s 7(2) of the Specific Relief Act 1950 which provides:

> Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.

It is clear that the defendant cannot enforce its right to recover the project land against the plaintiff otherwise than by proceedings in the court. I would have thought that the defendant being an important public body, would not have threatened to act in breach of the law but instead to strive to set high standards in corporate governance. Stellar examples of good conduct would be expected no less from the defendant. The grant of the injunction is thus made necessary by the defendant's conduct so as to prevent it from taking the law into its own hands and setting a bad example.

(See *Chellapa a/l K Kalimuthu* (*suing as public officer of Sri Maha Mariamman Temple, Hicom, Shah Alam, Selangor*) *v Sime UEP Properties Bhd* [1998] 1 MLJ 20 and *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611).

[50] The plaintiff and defendant are joint venture partners. In *Newacres Sdn*

Bhd v Sri Alam Sdn Bhd [2000] 2 AMR 1730, the Federal Court reaffirmed the existence of fiduciary relations between joint venture partners. In this case the plaintiff has complained of undue delay, procrastinations in contract negotiations and unexplained failure to conclude new agreements reached. The plaintiff has accused the defendant of acting in bad faith causing the plaintiff to loose time and money. Even Wembley the principal financier of the plaintiff, went into liquidation in the process. The alleged lack of good faith and breach of fiduciary duties is therefore an issue to be tried.

[51] It is not disputed that both parties entered into negotiations with the common intention of restarting the construction works. What was not agreed to were the terms of the new agreement essentially on profit sharing, to be reached. The defendant complained that the plaintiff kept vacillating on its proposals, shifted the goal posts and habitually failed to adhere to a stand already taken but the main complaint was that the plaintiff after 13 years of extensions of time was unable to raise the funds to complete the project.

[52] Whatever the reasons or causes for the long and protracted negotiations which failed eventually, leading to the purported termination of the JVA and lease agreements are not for this court to determine. The court will not venture to apportion blame between the parties as that is the very function of the arbitrator. In fact the arbitrator will be tasked with the important job of determining the following, inter alia, issues, which I shall attempt to set out in summary:

(a) whether the delay in the completion of the project amounts to an abandonment of it since 1997;

(b) whether the plaintiff's financial problems were due to the Asian economic crisis and its implication on the JVA;

(c) whether the defendant's decision not to sign the supplementary agreement when Bank Pembangunan withdrew its offer of banking facilities from the plaintiff was proper;

(d) whether the non-signing of the supplementary agreement by the defendant to confirm the extension of time put paid to the debt restructuring scheme approved by the Securities Commission by derailing it;

(e) whether without the supplementary agreement being executed the plaintiff was deprived of the opportunity to raise sufficient funds to continue with the project;

(f) whether the defendant by its objection to a second charge being created on the project land further deprived the plaintiff of the opportunity to revise its financing;

(g) whether Global Upline Sdn Bhd would have been in a position to rescue the plaintiff financially if the development agreement had been entered into by the defendant;

(h) whether the defendant's demands for additional payment of RM265m for a revaluation of the project land, payment of 20% minimum guaranteed profit and prohibition on charging of the project land were justified;

(i) whether the JVA is in substance a mere building contract or the plaintiff under the JVA is a developer with indefeasible rights under the National Land Code being the registered leasee of five leases over the project land;

(j) whether the defendant has no immediate or existing right to repossess and occupy the project land but only a reversionary interest of 11 years on the project land;

(k) whether the purported forfeiture of the five leases by the defendant is proper and valid;

(l) whether the plaintiff can only hope to recover damages in the arbitration proceedings and will not be able to obtain any specific relief; and

(m) whether the BLT concept of development of the project ought to have been changed to an outright sale concept.

[53] As considered by the court earlier all the above issues and more ought to be left to the arbitrator to adjudicate. The arbitrator will have to pointedly determine the reasons or faults for the long delay in the project. It is only after the arbitrator has determined the status of the purported forfeiture of the five leases can it be determined who has the right to possess and occupy the project land.

[54] Counsel for the defendant submitted that all that the plaintiff can claim in the arbitration proceedings was for damages ie monetary compensation and not for specific relief. This was premised on the basis that the JVA is a building contract and therefore the defendant would not be able to obtain a decree of specific performance against the plaintiff by virtue of s 20(1)(b) of the Specific Relief Act 1950 which provides as follows:

> Contracts not specifically enforceable
>
> 20(1). The following contracts cannot be specifically enforced:
>
> (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms.

And by reason of the principle of mutuality which governs equitable relief, the plaintiff cannot equally obtain specific relief against the defendant. Counsel for the defendant further submitted that by virtue of s 54(f) of the Specific Relief Act 1950 an injunction cannot be granted when specific performance cannot be decreed. On the other hand, counsel for the plaintiff argued that the JVA is not the usual building contract entered into between the developer/owner and the contractor. The plaintiff maintains that it is not a mere contractor but a developer, albeit jointly with the defendant, in its own right. Counsel for the defendant cited the case of *Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269 in support of his contention that the court will not supervise a building contract and the contractor will have his remedy in damages. But there lies the distinction between *Kong Wah* and this case as the plaintiff here contends that it is not a mere contractor. In any event the court takes the position that whether the plaintiff is a mere contractor or a developer, it is a serious issue to be tried. The consequence of the decision is obvious. If the JVA is held not to be a mere building contract then the plaintiff will be entitled to specific relief including an order of injunction.

[55] Counsel for the defendant also contended that the five leases granted to the plaintiff are not a 'tenancy exempt from registration' pursuant to ss 213 and 223(2) of the National Land Code. In fact, they are registered leases for 88 years and as such counsel contended that they do not come within s 7(2) of the Specific Relief Act 1950 and hence the defendant can enforce its right to recover the project land against the plaintiff as occupier without resorting to 'proceedings in the court'. This is a rather interesting and novel submission on a point of law. I would have thought that as s 7(2) of the Specific Relief Act 1950 affords protection to a tenant under a tenancy of less than three years, a registered lessee of 88 years as in this case, would be afforded a better right against self-help and that the defendant ought to obtain an order for the forfeiture of the leases before it can attempt to repossess the project land.

BALANCE OF CONVENIENCE

[56] As for the balance of convenience, it is the defendant's case that as the plaintiff is not in a financial position to recommence construction work on the project and to complete it, it would be better for the defendant to repossess the project land and take steps to have the project completed and that it would be in the public interest to do so (see *Tenaga Nasional Berhad v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133; [2001] 1 CLJ 695 (CA)). The plaintiff should not be allowed to remain on the project land and do nothing and at the same time restrain the defendant from getting on with the completion of the project through a third party.

[57] It will not be quite correct to say that the plaintiff wants to remain on

the project land and do nothing as it has every intention to proceed with the resolution of the disputes through arbitration. The scales of justice will be balanced in this case with the defendant made to wait a little longer pending the resolution of all disputes by the arbitrator.

WHERE THE JUSTICE OF THE CASE LIES

[58] The parties have agreed to refer the disputes to arbitration. Yet the defendant has seen it fit to give notice of its intention to repossess the project land and to cancel the plaintiff's five leases. Why the defendant has chosen to do so has not been fully and satisfactorily explained.

[59] The defendant has also clearly expressed its intention to secure a third party to take over the project from the plaintiff and to complete it. In fact, the plaintiff had requested the plaintiff's bank, RHB Bank Bhd to nominate a third party or to agree to the defendant's intention to secure a third party through a tender.

[60] If the defendant is not restrained by an order of injunction from doing so, the powers and/or jurisdiction of the arbitrator will be fettered and the express provisions in the JVA and lease agreements to refer all disputes to arbitration would be rendered quite meaningless.

[61] The justice of the case surely lies in favour of the plaintiff to let the status quo remain until the arbitrator has the chance to arbitrate on the disputes.

WHETHER DAMAGES ARE AN ADEQUATE REMEDY

[62] The plaintiff avers that over the years it has spent tens of millions of ringgit in the construction of the project. Apart from the monetary loss, its reputation has been affected in not being able to complete the project. The plaintiff is more interested in salvaging and/or maintaining its reputation by completing the project rather than in monetary compensation. In any event no offer of monetary compensation has been made by the defendant and besides it would be difficult to quantify the damages given that the delay has been for more than 13 years.

Further, after the launch of the project, 211 purchasers have purchased business premises from the plaintiff. The plaintiff should not be placed in a position where its contractual obligations to these purchasers will be affected but instead the plaintiff should be encouraged to fulfill them.

[63] If the non-completion of the project was due to the breaches by the

plaintiff, the defendant ought to have taken action against them way back in 1998 after the expiry of the 72 months contractual period. Why the defendant did not do so has not been explained and after a slumber of 13 years the defendant suddenly awakens and is in a hurry to complete the project in the 'public interest'. What about the 'public interest' during the past 13 years? Was there none to be preserved or to speak of?

[64] If the defendant is not restrained by an order of court and proceeds to secure a third party to complete the project and in the event it is subsequently decided by the arbitrator that the termination of the JVA and the five leases was wrong and bad in law, the quantum of damages to be paid by the defendant will be enormous and quite frightening. And, sadly it will be the public that will suffer in the long term as it will be public funds that will be used to pay the damages. If the defendant proceeds as it intends to, it will be exposed to unnecessary risks and it is the duty of the court to minimise such risks in the interest of the public. Having waited for so long, I do not understand why the defendant cannot wait for a while longer till the disputes are resolved by the arbitrator. The balance of convenience clearly lies in favour of the plaintiff.

CONCLUSION

[65] In the result, an order in terms of prayers 1(a) and (b) of encl 1 was allowed to the plaintiff. No order was made on encl 2 and encl 10 was dismissed with costs. The arguments raised by the defendant in support of encl 10 are the same issues canvassed by the parties as discussed above.

Enclosure 1 allowed and encl 10 dismissed with costs.

Reported by Kanesh Sundrum